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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 591

NELSON-RYAN FLIGHT SERVICE, INC.,
Petitioner

vs.

LORRAINE M. LANGE, INDIVIDUALLY, AND LORRAINE M. LANGE, TRUSTEE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Minnesota on the first appeal by respondent which reinstated the jury verdict is reported at 259 Minn. 460, 108 N. W. 2d 428. The opinion of the Supreme Court of Minnesota on the second appeal by petitioner affirming the trial court's order denying a new trial not yet officially reported, is reported at 116 N. W. 2d 266.

The references are as follows:

"R— "—The printed record on the first appeal

"P— "—Petition for Writ of Certiorari

"P. App. B— "—Petition for a Writ of Certiorari—Appendix B

"P. App. C— "—Petition for a Writ of Certiorari—Appendix C

JURISDICTION

Jurisdiction is objected to on the following ground:

1. No Federal question is presented under 28 U. S. C., §1257 (3).

QUESTIONS PRESENTED

1. Does the decision of the Supreme Court of Minnesota rest on adequate and independent non-Federal grounds?

2. Is the decision of the Supreme Court of Minnesota in conflict with any established Federal Law?

STATEMENT

(The statement set forth by petitioner has been prepared in a light most favorable to it and omits material facts upon which the decision of the Supreme Court of Minnesota rests. The statement parallels a similar statement contained in its brief presented to the Supreme Court of Minnesota. Because of the unfairness of petitioner's statement and its misleading and distorted claim of what the Minnesota decision holds, respondent herewith sets forth her statement of facts, prepared in accordance with the rule that the record on appeal must be considered in a light favorable to the prevailing party. For purposes of clarity, petitioner will be hereinafter referred to as defendant and respondent as plaintiff.)

Plaintiff, as court appointed trustee, brought this action in Hennepin Country District Court for wrongful death of her husband. The complaint charged negligence on the part of the defendant flight school and its flight instructor resulting in the death of her husband (hereinafter referred to as Lange).

Prior to September 30, 1957, Lange had never been checked out in a 7A C Tri-Traveler aircraft (this was a dual-control tandem airplane), although he had previous flying experience in aircraft somewhat similar. The defendant being in the business of operating a flight school and renting of aircraft arranged a check-out flight for Lange in this aircraft (owned by defendant flight school). The accepted procedure and that required by defendant was that its flight instructor should take Lange up and familiarize him with the flight characteristics of the aircraft.

One reason defendant required such a flight (as testified to by defendant's expert) was that the student or trainee (Lange) may not be aware of the flight characteristics of that aircraft since he had no experience in it (R. 231, f. 3; R. 232, f. 1).

The defendant's expert further testified defendant's flight instructor either was or should have been fully aware of all of the stall and flight characteristics of the aircraft (R. 231, f. 3).

Another purpose of the flight was a safety measure for the person being checked out (R. 218, ff. 2, 3), in this case for Lange's safety.

Defendant's president testified that its flight instructor had the responsibility of preventing the aircraft from getting into a dangerous flight attitude (R. 127, f. 3). Defendant's vice-president testified that if the aircraft *came close* to a dangerous attitude, the flight instructor was to come on the controls (R. 168, f. 3).

There is no dispute (as testified to by defendant's own expert) that throughout the flight, Lange was a trainee-student and that defendant's flight instructor was the pilot in command of the aircraft (R. 144, f. 2; R. 219, f. 2; R. 233, f. 3; R. 234, f. 1). The duties and responsibility

(above referred to) of this flight instructor (referred to by defendant's witness as the pilot in command) were testified to by defendant's own witnesses.

When turning onto its final approach, the aircraft was permitted to stall (R. 116, f. 1; R. 99, f. 2; R. 199, f. 3). Without recovering from the stall the airplane was permitted to go into an over the top spin and crash (R. 204, ff. 2, 3; R. 224, f. 1; R. 227, ff. 2, 3). During an over the top spin there is "enough time to write a letter home" (R. 277, f. 1). A spin need not follow a stall. An aircraft can be stalled without falling off into a spin (R. 117, f. 2). Defendant's flight instructor should have known and been aware of the characteristics of the aircraft which cause an over the top spin (R. 232, f. 1). The defendant's flight instructor had visual access to the airspeed indicator (R. 109, f. 3; R. 110, f. 1) and physical access to controls at all times. The procedure that a flight instructor should follow to recover from a low level stall would be to apply forward stick, apply power to conserve altitude, level the wings with co-ordinated use of aileron and rudder and then with sufficient back pressure bring the plane back into level flight (R. 209, f. 3; R. 210, ff. 1, 2, 3). The flight instructor did not do so and the plane crashed in a vertical position, nose down, killing both Lange and the flight instructor.

The weather was calm, visibility was 15 miles and ceiling unlimited. There was no malfunction of the plane. It was stipulated that there was no evidence of mechanical failure causing or contributing to the crash.

The jury could infer that Lange was not on the controls at the time of the crash. The evidence strongly suggests that the flight instructor was on the controls at the time of the crash. Lange was in the front cockpit and the flight

instructor was in the rear cockpit. Each of the occupants had a right and left rudder pedal. Rudder pedals control the right and left movement of the nose of the aircraft. They are operated by the feet with the legs extended in a forward position. Both of Lange's legs were underneath his seat (R. 135, f. 1) when first observed by people arriving at the scene (R. 25, ff. 1, 2), and it was necessary to cut away part of the understructure of Lange's seat to remove his body from the aircraft (R. 25, f. 2; R. 238, f. 3; R. 239, f. 1; R. 243, ff. 2, 3). His feet were as far from the rudder pedals as it was possible to place them.

The metal right *rear* rudder pedal, used by the defendant's flight instructor, was bent forward 15 to 20 degrees (R. 28, f. 3). The aircraft also had a set of heel brakes operated by the pilot's heels (R. 28, f. 2). The defendant's flight instructor's right heel brake was broken off (R. 28, f. 2), indicating the flight instructor's feet were on the controls at the time of the crash.

The elevator and ailerons (control surfaces of the aircraft) are operated by a control stick. One control stick is in the forward cockpit and a second control stick is in the rear cockpit (R. 75, f. 2). These control sticks appear between the knees of the occupants of the aircraft as they sit down (R. 75, f. 2). The aircraft also has two throttles, one for each occupant of the aircraft located on the left side normally operated by the left hand (R. 75, f. 3; R. 76, f. 1). Lange's hands were both above his head (R. 134, ff. 2, 3). The force of impact had pushed the engine back against the instrument panel and against Lange's chest. The defendant's flight instructor's right hand was found in the general area of the control stick (R. 135, f. 3). The defendant's flight instructor's left hand was in the general area of the throttle (R. 135, f. 2). The signal of

Lange raising his hands in the air is to indicate to the instructor in the rear that the student is not on the controls of the aircraft (R. 230, f. 3; R. 231, f. 1).

Because defendant's president and vice-president had testified to the duties and responsibilities of its own flight instructor and defendant's expert had frequently referred to the flight instructor as the "Pilot in Command" it was later, during the trial, stipulated and agreed by defendant and plaintiff that the court could instruct the jury as to the definition of pilot in command as set out in Civil Air Regulations (Part 43, §43.70), as follows:

> "Pilot in Command shall mean the pilot responsible for the operation and safety of the aircraft during the time defined as flight time."

In the opinion sustaining the jury verdict for the plaintiff, the Supreme Court of Minnesota, discussed cases where the evidence excludes causes for the plane crash other than human fault, and stated:

> "Whether res ipsa loquitur is technically applicable or not, it appears more appropriate at the present time and more consonant with contemporary conditions to permit a jury to draw reasonable inferences from available circumstantial evidence as to the cause of a plane crash rather than to deny the plaintiff any possibility of relief in the absence of direct evidence of negligence or causation."

(P App. B, 12 a) *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N. W. 2d 428, 431.

Defendant argues that to "supply the gap", the Minnesota Court had to rely on §60.02 of the air traffic rules of Civil Air Regulations *because under Minnesota law, res ipsa loquitur could not apply* since it could not be proved

that defendant or its agent had *exclusive* control at the time of the negligent operation (p. 11, footnote 9). There was no gap that had to be filled. Defendant's statement of Minnesota law is incorrect. The Minnesota law is:

> "Where a defendant does not have exclusive control of an instrumentality which causes injury, but plaintiff reasonably eliminates other causes than defendant's negligence, *exclusive control in defendant is not necessarily a prerequisite to application of res ipsa loquitur.*" (Italics supplied.)
>
> "Res ipsa loquitur doctrine is essentially *one of evidence rather than tort law* and whether it should be applied is largely a question of how justice in such cases is most practically and fairly administrated." (Italics supplied.)

Rinkel v. Lee's Plumbing & Heating Company (1959), 257 Minn. 14, 99 N. W. 2d 779. *Minn. Rules of Civil Procedure*, Rule 43.06.[1]

Independently of any Civil Air Regulation, defendant's witnesses established the duties of its own flight instructor, which duties he did not perform and which failure proximately resulted in the crash and resulting damages. The prima facie case thus established under the Minnesota rules of evidence did shift the burden of going forward with the evidence to the defendant.

The Minnesota rule of law in an aircraft negligence case is that *in the absence of extenuating circumstances*, the pilot in command of an aircraft is chargeable with the

[1]Minnesota Rules of Civil Procedure, Rule 43.06. RES IPSA LOQUITUR. *Res ipsa loquitur* shall be regarded as nothing more than one form of circumstantial evidence creating a permissive inference of negligence. The plaintiff shall be given the benefit of its natural probative force existing at the close of all the evidence even though he has introduced specific evidence of negligence or made specific allegations of negligence in his pleadings.

negligence in the operation thereof whether or not he is physically at the controls. (P App. C, 20 a) *Lange v. Nelson-Ryan Flight Service*, ——Minn.——, 116 N. W. 2d 266, 268. (Italics supplied.)

The Minnesota rule by its terms has no application if the jury finds as a fact, extenuating circumstances which would excuse or justify the conduct of the pilot in command. Weather, mechanical condition of the aircraft whether or not there was any malfunction of the aircraft were all relevant and material considerations having a direct bearing on the question of "extenuating circumstances" and considered by the Court. This evidence was discussed at length in the opinion.

The defendant is asking the Supreme Court of the United States to speculate on what the Supreme Court of Minnesota would hold in a case if the evidence would show the pilot in command was not negligent.

In arguing that the Minnesota decision imposes an absolute duty on the pilot in command and makes him an insurer of all persons aboard during flight (p. 14) defendant has misrepresented and distorted that part of the language in the decision which says "*in the absence of extenuating circumstances.*"

ARGUMENT

The Petition for a Writ of Certiorari should be denied.

The statement heretofore set out contains a clear and accurate statement of the evidence presented. Plaintiff will consider the adequate and independent non-Federal grounds upon which the decision of the Supreme Court of Minnesota rests and the decisions set forth in the Petition for a Writ of Certiorari which defendant claims are inconsistent with the Minnesota decision.

A. The Minnesota decision finds support in adequate state grounds apart from the Federal question which defendant now seeks to raise.

Reasonable inferences from the evidence set forth in the statement show:

1. The defendant (flight instructor) had the duty to prevent the aircraft from getting into a dangerous flight attitude.

2. The aircraft approached a dangerous and hazardous situation, at which time the flight instructor had a duty to take the control of the aircraft.

3. That Lange was a student-trainee pilot throughout the flight.

4. That the student pilot had not previously flown this aircraft and therefore was not familiar with the flight characteristics of that airplane.

5. That defendant flight instructor had the opportunity to control the aircraft at all times during the flight, and had a complete set of controls for his exclusive use throughout the flight.

6. That the duty to avoid dangerous situations included the aspect of a low level stall and an over the top spin to the right.

7. That the stall characteristics of the aircraft were such that the defendant flight instructor should have recognized the approaching stall.

8. That the stall and the over the top spin to the right was a slow procedure.

9. That if the defendant flight instructor had taken over the controls as required when the dangerous situation began to develop, he would have had sufficient time to recover and could have avoided the crash.

10. That the defendant flight instructor failed to perform this duty.

11. That the defendant flight instructor owed this duty to his student trainee (Lange).

12. That his failure to perform this duty resulted in damage to plaintiff.

Adequate and independent non-Federal support for the Minnesota decision is based on the common law of Minnesota and the applicable rules of evidence.

Negligence with resulting liability may be established by either an unexcused *omission* to perform a duty or by *commission* of an act deemed negligent.

Where a defendant's failure (omission) to perform an established duty is not excused or justified, liability may attach and no act of commission need then be established.

Here defendant flight instructor had the duty to prevent the aircraft from getting into a dangerous flight attitude. His failure to perform that duty (omission) was negligence unless excused or justified.

The evidence bearing on excuse, justification or extenuating circumstances was gone into at length.

The decision considered: that the weather conditions were calm; the ceiling was unlimited; that the engine had previously been thoroughly checked; that the controls were functioning properly even after the crash; that there was no malfunction of the plane; the evidence eliminating the possibility of collision with another plane or object; that the flight instructor rather than Lange was on the controls at the moment of impact; that Lange was a student throughout the flight; that the flight instructor's responsibility to Lange was measured by the legal standard of a carrier.

In discussing the high duties of the defendant's flight instructor, the Minnesota Court stated:

"The duty is commensurate with the skills required and the perils incurred."

(P App. B. 15 a) *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N. W. 2d 428, 432.

In imposing these responsibilities, the Minnesota Court drew on law involving other situations requiring high skills and involving grave dangers. It discussed the surgeon's responsibility in an operating room for the negligence and unskillful acts of a nurse or assistant; the responsibilities of a master of a ship at sea for the conduct of his crew. (P App. B. 15 a) *Lange v. Nelson-Ryan Flight Service Inc.*, 259 Minn. 460, 108 N. W. 2d 428, 433.

The consideration of the Federal regulation was therefore not necessary to reach the determination which the Supreme Court of Minnesota reached.

B. The decisions of the Civil Aeronautics Board are in complete accord with the decision in the instant case.

The Minnesota rule is, *in the absence of extenuating circumstances*, if an aircraft is operated in a negligent manner, the pilot in command is negligent regardless of whether he is at the controls at the time.

The Civil Aeronautics Board decisions relied on by the defendant will be considered in the order that they appear in the petition.

Smith Airman Certificate, 13 C. A. B. 117 (pp. 16, 17). This case involved a disciplinary proceeding instead of a civil liability case. It is further distinguished in that the *Smith* case dealt with a pilot and co-pilot situation. In the instant case we have a flight instructor and student pilot arrangement.

The fact that the Board held in the *Smith* case that the unskilled and careless act of the co-pilot was not imputed to the pilot in command does not mean, as is argued by defendant, that the flight instructor has no responsibility for the unskilled act of the student pilot.

Notwithstanding, the *Smith* case is consistent with the Minnesota decision.

The Board held that the extenuating circumstances were not sufficient to justify or excuse the pilot in command's failure "to have any effective arrangement for his co-pilot *to insure* the maintenance of such lookout", and that such failure was negligence on the part of Captain Smith. The Board stated: "His responsibility for the safe operation of the aircraft is fixed by the Civil Air Regulations and is one which he cannot delegate".[2]

The Minnesota decision certainly imposes no stronger duty on the pilot in command than does the holding in the *Smith* case.

Hazen Case, 26 C. A. B. 824 (pp. 17, 18, 19, 20): This case holds that in a scheduled air carrier case, the pilot in command has a right to rely on the flight engineer to carry out the functions reasonably and properly assigned to him.

Here the evidence showed that specific duties were properly and reasonably assigned to a flight engineer who was trained and properly qualified to perform those duties. It is consistent with the Minnesota decision in that the reasonable conduct of the pilot in command excused and justified his failure to determine that the aircraft was unairworthy. It can not reasonably be argued that the result

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[2]The pilot in command (Smith) flew from the left cockpit. Reier, the co-pilot, was in the right cockpit and failed to see the colliding aircraft approach from that side.

would have been the same if that pilot in command had assigned those same duties to an unqualified student pilot instead of a qualified and trained flight engineer.

That decision does not control the conduct of a flight instructor with respect to a student pilot on a training check-out flight.

In the same case, the claim of imputed negligence to the pilot in command (when the co-pilot attempted a turn at too low an altitude), was not established because "The Board found that the attention of the pilot in command had been legitimately diverted for approximately four seconds to raise the landing gear".

Under the facts in that case, he was relieved of this charge of negligence because of extenuating circumstances, a result clearly consistent with the Minnesota decision.

The case does not hold that the pilot in command would have been justified in diverting his attention from the control of the aircraft to raising the landing gear if the other occupant was a student pilot instead of a co-pilot on a scheduled air carrier. The question of whether extenuating circumstances justify or excuse the conduct of the pilot in command remains a fact question to be determined in each case based on the evidence presented.

Thomas Case, 29 C. A. B. 1493 (p. 20): The Board held that whether a violation of a civil air regulation by a co-pilot in a scheduled air carrier could be imputed to the pilot in command, depends on the circumstances of each case.

The Minnesota decision does not quarrel with this result. If the circumstances in any particular factual situation excuse or justify the action of the pilot in command then certainly he is not to be charged with the violation. The rule is the same. The question is—what are the facts?

Its application to different fact situations may properly result in different conclusions.

Conway Case, Order No. S-1114 (p. 22): This case holds that a co-pilot in an irregular air carrier case can be held responsible for his own act of negligence and is of course proper.

If there had been evidence establishing negligence on the part of Lange, the trustee would have been barred from recovery because of contributory negligence.

Defendant would have this Court believe the Minnesota decision holds that contributory negligence is no defense in an airplane negligence case. This interpretation is wrong. The Minnesota Court stated:

> "Defendant argues that the decedent (Lange) was guilty of negligence, or contributory negligence and that this was the proximate cause of the crash. The difficulty with this argument is that there is no evidence whatever from which an inference in its support can be drawn".

(P App. B, 16 a) *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N. W. 2d 428, 433.

Jones, Scott Case, Order No. S-1149 (pp. 22, 23): In this proceeding both the pilot in command and co-pilot of an irregular air carrier were found guilty of flight into heavy icing conditions. The evidence established that Jones (co-pilot) made the crucial decision to fly into the icing weather and Scott (pilot in command) acquiesced in that decision.

The Minnesota holding does not conflict with that result.

In that case there was direct evidence of negligence on the part of the co-pilot with which he was properly charged. The case does not stand for the proposition

that the co-pilot would be guilty of such violation if there were no evidence of guilt on his part.

In the instant case there is no evidence of negligence on the part of the student pilot (Lange). The issue of contributory negligence of Lange was a fact question submitted to the jury and resolved in the negative.

In discussing defendant's argument that the Minnesota decision imputes to a pilot in command any negligence of the other pilot and, in fact, makes the pilot in command an insurer, the Supreme Court of Minnesota clearly stated that defendant's interpretation was erroneous.

> "We cannot accept defendant's interpretation of our prior decision as it—not unlike most criticism expressed by a losing litigant—obviously overstates the decision's import."

(P App. C, 21 a) *Lang v. Nelson-Ryan Flight Service*, —— Minn. ——, 116 N. W. 2d 266, 268.

Each of the cases cited by defendant is in accord with the decision of the Supreme Court of Minnesota.

CONCLUSION

Defendant has failed to set forth any ground upon which this Court should grant the Petition for a Writ of Certiorari. It is therefore respectfully submitted that the Petition should be denied.

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